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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL RICHARD LYNCH and STEPHEN KEITH CHAMBERLAIN,

Defendants.

Case No. 3:18-cr-577-CRB

NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA ISSUED TO NON-PARTIES HEWLETT PACKARD, INC. AND HEWLETT PACKARD ENTERPRISE PURSUANT TO RULE 17(c); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 8, 2024
Time: 4 p.m.
Place: Courtroom 6, 17th Floor
Judge: Hon. Charles R. Breyer

Date Filed: March 25, 2024
Trial Date: March 18, 2024

NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that, on April 8, 2024 at 4 p.m.,[1] or as soon thereafter as the matter may be heard by the above-referenced Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Courtroom 6, Hewlett Packard, Inc. and Hewlett Packard Enterprise (collectively referred to here as "HP") will and hereby do move this Court pursuant to the Federal Rule of Criminal Procedure 17(c)(2) for an order quashing the subpoena brought by Defendant Michael Richard Lynch, which was issued to HP pursuant to Federal Rule of Criminal Procedure 17(c).

The Motion to Quash is based upon this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the Declaration of Susan D. Resley in support of this Motion and accompanying Exhibit, the reply to be filed in support of this Motion, oral argument of counsel at the hearing, all pleadings and papers on file in this action, and any other matters the Court may properly consider by judicial notice or otherwise.

[1] Hewlett Packard Enterprise and Hewlett Packard, Inc. (collectively, "HP") are aware that Crim. L. R. 47-2 is not applicable during the pendency of a trial but provided a 14-day notice period as a point of reference and, in accordance with Judge Breyer's Standing Orders, HP selected a hearing date that appears to be available on the court calendar and a time that is after a regularly scheduled court day.

Dated: March 25, 2024

Respectfully submitted,

By: _____

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I. SUMMARY OF ARGUMENT

This matter is a federal criminal case. It is *not* a civil matter. Yet, on the eve of trial, despite having had years to prepare, Defendant Michael Lynch ("Lynch") served on the Hewlett-Packard entities (collectively "HP")[2] what purports to be a Rule 17 subpoena ("the Lynch Subpoena"), but which actually reads like a civil discovery request, running afoul of all Rule 17 requirements. The Lynch Subpoena also flagrantly disregards this Court's recent rulings about whether and to what extent Christopher Yelland ("Yelland") and Antonia Anderson ("Anderson") may testify, including by seeking related materials that the Court has determined will not be part of the trial. Despite a meet-and-confer session during which HP counsel gave Lynch full notice of the subpoena's deficiencies, Lynch has refused to withdraw—or even narrow—the Lynch Subpoena. Consequently, HP is left with no other choice but to move this Court to quash the Lynch Subpoena, based on three grounds, each of which provides an independent basis for quashing.

First, the Lynch Subpoena constitutes an inappropriate, open-ended discovery request. Specifically, the Lynch Subpoena requests "*[a]ll* records and communications" relating to Autonomy's Restatement (the "ASL Restatement")—over a period of more than two years—based on speculation that *a single document*, produced recently by another third party, suggests that there are other similar documents out there. This is the epitome of a fishing expedition. As the Ninth Circuit has made clear: "Rule 17(c) was not intended as a discovery device, or to allow a blind fishing expedition seeking unknown evidence." *United States v. Villa*, 503 F. App'x. 487, 489 (9th Cir. 2012) (internal quotations omitted).

Second, the Lynch Subpoena fails to satisfy *any* of the requirements prescribed by the U.S. Supreme Court in *United States v. Nixon,* 418 U.S. 683 (1974). The Lynch Subpoena seeks evidence that is hearsay and thus *inadmissible*. In requesting "all" documents of a certain category, the Lynch Subpoena fails *Nixon*'s *specificity* requirement. Finally, the Lynch Subpoena

[2] In November 2015, The Hewlett-Packard Company separated into two public companies—Hewlett Packard Enterprise ("HPE") and Hewlett Packard, Inc. ("HPI").

engages in a fishing expedition for documents pertaining to Anderson and Yelland, which are *irrelevant*, in large part because the Court has limited the testimony of both Anderson and Yelland regarding the ASL Restatement.

Third, the Lynch Subpoena seeks material that is protected by the attorney-client privilege and attorney work-product doctrine, in addition to witness statements, which Rule 17(h) explicitly prohibits.

II. BACKGROUND

A. The Restatement of Autonomy's Accounts Was Necessitated by Fraud Perpetrated by Autonomy Executives

Because the Court is now very familiar with the facts, the following recitation will be brief. In the summer of 2012, HP began its internal investigation into Autonomy's accounting practices. HP engaged Morgan, Lewis & Bockius LLP ("Morgan Lewis"), to lead the investigation. Morgan Lewis retained PricewaterhouseCoopers LLP ("PwC") as forensic accountants. When the investigation revealed the massive fraud led by Lynch and his co-conspirators, Yelland and his finance team at HP (including Anderson) analyzed and revised Autonomy's previously issued financial statements. This resulted in a restatement in the United Kingdom with Companies House of the Company's accounts (the "ASL Restatement"), which identified significant accounting improprieties, disclosure failures, and outright misrepresentations by Lynch and others at Autonomy.

B. The Court Has Made Clear the Permissible Scope of Yelland's and Anderson's Testimony in this Trial

This Court has clearly articulated in pre-trial rulings the permissible scope and content of Yelland's and Anderson's upcoming testimony in the Lynch-Chamberlain trial. As in the 2018 trial of Autonomy CFO Sushovan Hussain (the "Hussain Trial"), the Court has ruled that the ASL Restatement can be received into evidence in the Lynch-Chamberlain trial and that the Government may use related summary charts regarding specific transactions for demonstrative purposes.[3] Tr. 5:22–6:5 (Feb. 21, 2024). The Court also has determined that Anderson "doesn't

[3] Citations to the hearing transcript ("Tr.") refer to either the February 21, 2024 or February 28, 2024 proceeding.

have to testify" about the ASL Restatement in the Lynch-Chamberlain trial, because her testimony would be cumulative of Yelland's on that topic. Tr. 13:21–23 (Feb. 28, 2024). As to Yelland, the Court has observed that the Government failed to designate him as an expert in this trial and that "[h]e's not a summary witness. He's a percipient witness in that he prepared a business record, and that comes in."[4] Tr. 13:18–29; 24:17–19 (Feb. 28, 2024).

C. The Lynch Subpoena

On March 5, 2024, Lynch served his subpoena on HP. Resley Decl. ¶ 2, Exh. 1. The Lynch Subpoena is breathtaking in its broad sweep, as is clear from a verbatim recitation of the request:

> All records and communications between October 1, 2011 and January 31, 2014 relating to the bases for the restatement of Autonomy Systems Limited's ("ASL") 2010 accounts and the filing of ASL's 2011 accounts (collectively, the "ASL Restatement"), including:
>
> A. Christopher Yelland's communications with representatives of PwC, Morgan Lewis, Ernst & Young ("EY"), Deloitte, and/or HP's in-house legal department regarding the ASL Restatement and/or the internal investigation by Morgan Lewis and PwC;
>
> B. Antonia Anderson's communications with representatives of PwC, Morgan Lewis, EY, Deloitte and/or HP's in-house legal department regarding the ASL Restatement and/or the internal investigation by Morgan Lewis and PwC;
>
> C. Documents and communications generated or received by HP, its affiliates, and its advisors and consultants, such as work product, memoranda, supporting schedules, internal communications between Yelland, Anderson and/or others, or similar documents, explaining the bases for restating each of the transactions at issue in the ASL Restatement.
>
> For the avoidance of doubt, this subpoena seeks all documents in the above categories in unredacted form. Where redacted versions of the documents have previously been produced, or documents have previously been withheld from production, to the United States Department of Justice or the Securities and Exchange Commission based on assertions of the attorney-client privilege, the attorney work product doctrine, or any other similar privilege, we are seeking unredacted versions of all responsive documents.

Lynch has suggested that he is justified in using a Rule 17 subpoena to make such overly broad requests because EY previously produced a single document—pursuant to an MLAT

[4] To ensure Yelland's testimony remains limited to that of a percipient witness, the Court noted that "it would be helpful [for the Government] to write out Mr. Yelland's testimony" for the Court's review, to which the Parties agreed. Tr. 25:15–23 (Feb. 28, 2024).

request—that Lynch speculates may be one of many. As Lynch's counsel stated during the pretrial hearing on February 21, 2024:

> None of that was known at the *Hussain* trial because that document had not been produced yet. And many more like it are still being withheld on privilege grounds, so we have no basis to cross-examine Mr. Yelland and say: Our inquiries determined that that transaction didn't have any economic substance.
>
> The inquiries are not reflected in the documents on that trolley or in the index of materials that counsel says the summary chart was based on. We have no idea what they are, save for this one memorandum and a few scraps of e-mails that made it through the privilege filter. I don't know if that was a mistake on their part or what, but they paint a very different picture than the one that was presented at the Hussain trial.
>
> Tr. 18:10–22 (Feb. 21, 2024).

Hoping to narrow the disputes before this Court, HP counsel provided Lynch the Bates-label ranges of all documents supporting the summary charts, followed by a meet-and-confer between HP counsel and Lynch counsel on March 11, 2024. Resley Decl. ¶ 3–4. Nevertheless, and in spite of the Court's ruling of February 28, 2024 that Anderson would not testify at all about the Restatement, Tr. 13:21–23 (Feb. 28, 2024), Lynch refused to modify or withdraw any of the broad requests made in the Lynch Subpoena. Resley Decl. ¶ 4.

III. ARGUMENT

A. The Lynch Subpoena Far Exceeds the Limits of Discovery Permitted Under Rule 17(c)

Lynch may not engage in a fishing expedition by serving an overly broad Rule 17(c) subpoena. *See United States v. Villa*, 503 F. App'x. 487, 489 (9th Cir. 2012) (internal quotations omitted) (quashing subpoena because "Rule 17(c) was not intended as a discovery device, or to allow a blind fishing expedition seeking unknown evidence"). Discovery under Rule 17 must be narrowly tailored. Although Rule 17(c) provides that a party may compel a "witness to produce any books, papers, documents, data, or other objects," *see* Fed. R. Crim. P. 17(c)(1), this Court has observed that it "is not as broad as its plain language suggests." *United States v. Reyes*, 239 F.R.D. 591, 597 (N.D. Cal. 2006). As the Supreme Court has made clear, Rule 17(c) subpoenas are "not intended to provide a means of discovery for criminal cases." *Nixon*, 418 U.S. at 698; *see also United States v. Pac. Gas & Elec. Co.*, No. 14-cr-00175-TEH-1 (MEJ), 2016 U.S. Dist.

LEXIS 40587, at *7–8 (N.D. Cal. Mar. 28, 2016) (holding "a Rule 17(c) subpoena reaches only *evidentiary* materials—not all *discoverable* materials") (emphasis in original). A proponent may not seek records "on the possibility that the events may not have happened as described" by witnesses or victims, or where he does not know if helpful information exists in the requested materials. *United States v. Johnson*, No. CR 94-0048 SBA, 2007 U.S. Dist. LEXIS 95834, at *10-11 (N.D. Cal. Dec. 24, 2007). Further, Rule 17(c) does not permit a defendant to bypass the limitations of discovery provided by the government pursuant to Rule 16. *Id.* at *5 (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)); *United States v. Rodriguez*, No. 2:11-0296 WBS, 2016 WL 6440323, at *1 (E.D. Cal. Oct. 28, 2016) ("The discovery tools available to defendants in criminal cases are limited, and are to be found elsewhere in the Federal Rules of Criminal Procedure, not in Rule 17.").

Lynch's request for "[a]ll records and communications" relating to the ASL Restatement during a period of more than two years reads like a broad *civil* discovery request, not a narrowly tailored request for known evidentiary materials in a federal *criminal* proceeding. Furthermore, Lynch bases the entire sweeping Lynch Subpoena on having found *a single document* (explained above) that he claims establishes that there may be other similar documents. This is woefully inadequate—especially where that one document is privileged and inadmissible (despite Lynch's conclusory and unfounded assertions of a blanket privilege waiver). *See Laub v. Horbaczewski*, No. CV 17-6210-JAK (KSX), 2020 WL 7978227, at *8 (C.D. Cal. Nov. 17, 2020) (ruling it "patently disproportional" to compel production of all Series C documents based on the slim possibility that one Series C document was relevant). The speculation that "there must be more where that came from" is not a basis for a Rule 17 subpoena. Rule 17 is not a discovery tool. The theoretical existence of documents, the contents of which Lynch purports to have no idea about, cannot serve as the basis for a Rule 17 request. Indeed, it is the quintessential example of a fishing expedition. For that reason alone, the Court should quash the Lynch Subpoena.

B. The Lynch Subpoena Fails to Meet the *Nixon* Factors

As the proponent of the Lynch Subpoena, Lynch must establish that each request (1) seeks *admissible* evidence; (2) is sufficiently *specific*; *and* (3) is *relevant* to the crimes charged. *Nixon*,

418 U.S. at 700; *see also Reyes*, 239 F.R.D. at 598. Lynch cannot satisfy any of the three required elements here, providing additional, independent grounds for the Court to quash the Lynch Subpoena.

1. Lynch Seeks Documents That Are Not Admissible

The subpoena proponent must make a "sufficient preliminary showing that . . . [the requested material] contains evidence admissible with respect to the offenses charged." *Nixon*, 418 U.S. at 700. Admissibility "is governed by the Federal Rules of Evidence." *United States v. Pac. Gas & Elec. Co.*, No. 14-cr-00175-TEH, 2016 U.S. Dist. LEXIS 78798, at *4 (N.D. Cal. June 16, 2016). Information sought for impeachment purposes does not meet the admissibility requirement. *See Nixon*, 418 U.S. at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."). Moreover, hearsay is presumptively inadmissible, and so this Court is among those that have quashed Rule 17(c) subpoenas requesting hearsay. *Reyes*, 239 F.R.D. at 600 (quashing subpoena requests seeking inadmissible hearsay); *see also United States v. Collins*, No. 11-CR-00471-DLJ (PSG) 2013 U.S. Dist. LEXIS 36361 *4-5 (N.D. Cal. Mar. 15, 2013) (same).

Here, Lynch seeks *all* records and communications relating to the bases for the ASL Restatement—that is, out-of-court statements that Lynch seeks to prove the truth of the matter asserted—the very definition of hearsay. Fed. R. Evid. 801(c). Specifically, Lynch seeks the following materials, which are presumptively hearsay:

- Yelland's and/or Anderson's communications with representatives of PwC, Morgan Lewis, Ernst & Young, Deloitte, and/or HP's in-house legal department regarding the ASL Restatement and/or the internal investigation by Morgan Lewis and PwC.
- Documents and communications generated or received by HP, its affiliates, and its advisors and consultants explaining the bases for restating each of the transactions at issue in the ASL Restatement.

In *Collins*, the court quashed the defendants' Rule 17 subpoena to the third-party victim on the grounds that the subpoena sought inadmissible hearsay—namely, as in this case, writings and recordings, such as chat logs and "written and electronic mail and notes or memoranda of meetings or conversations," reflecting the victim's investigations into the crimes for which the defendants were charged, including but not limited to investigation by the victim's employees,

consultants, and contractors. 2013 U.S. Dist. LEXIS 36361 at *3, 4-5. *See also United States v. Sanchez*, No. CR S-05-0443 WBS, 2007 U.S. Dist. LEXIS 103945, *3 (E.D. Cal. Jan. 9, 2007) (denying authorization to issue Rule 17(c) subpoena because, *inter alia*, "[w]itness interviews, memoranda, notes, reports, and the debriefings of third parties would clearly appear to be hearsay"); *Reyes*, 239 F.R.D. at 600 (finding that Rule 17(c) requests for summaries, notes, and memoranda related to interviews are inadmissible hearsay). If Lynch wishes to admit these hearsay documents, he must demonstrate that they qualify as an exception to the hearsay rule. Fed. R. Evid. 802. There is no hearsay exception that is applicable here, and Lynch has identified none.

Lynch apparently wishes to use these documents in his cross-examination of Anderson and Yelland. *See* Tr. 18:11–14 (Feb. 21, 2024) ("[M]any more [documents] like it are still being withheld on privilege grounds, *so we have no basis to cross-examine Mr. Yelland* and say: Our inquiries determined that that transaction didn't have any economic substance.") (emphasis added). However, this Court has already ruled that Yelland may not testify as an expert or a summary witness; rather, he may testify only as a lay witness. Tr. 13:18–29; 24:17–19 (Feb. 28, 2024). As such, Yelland may not himself rely on or convey hearsay evidence. *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007) ("If [the witness] relied upon or conveyed hearsay evidence when testifying as a lay witness . . . he exceeded the bounds of properly admissible testimony."); *see also United States v. Gadson*, 763 F.3d 1189, 1211 (9th Cir. 2014) ("[L]ay opinion testimony may not convey or rely on hearsay, because it is not helpful to the jury."). Indeed, the Court has made clear that Yelland's testimony must be confined to "vanilla" statements, such as, "'I did a restatement. I looked at the figures. I came to a different conclusion.'" Tr. 13:13; 9:19–20 (Feb. 28, 2024). He may not discuss what he relied on to formulate his opinion or otherwise disclose any inadmissible hearsay that formed the basis of his opinion. Similarly, this Court has ruled that Anderson will not testify about the ASL Restatement. Tr. 13:21–23 (Feb. 28, 2024). Given the Court's existing rulings, none of the hearsay evidence covered by the Lynch Subpoena is likely to be implicated by either Yelland's or Anderson's direct testimony; and the cross-examination purposes for which the Lynch Subpoena would seek

to use these extrinsic materials is insufficient to support admission into evidence. *See Nixon*, 418 U.S. at 701.

2. The Requests Fail the "Specificity" Requirement

Each request made under a Rule 17(c) subpoena must specifically identify particular items that a defendant believes in good faith are in existence. *Nixon*, 418 U.S. at 700. The specificity requirement "is not satisfied if a defendant does not know what the evidence consists of or what it will show . . . . Likewise, a defendant's mere hope the documents will produce favorable evidence will not support the issuance of a subpoena." *United States v. Aguilar*, No. CR 07-00030 SBA, 2008 U.S. Dist. LEXIS 63114, *18 (N.D. Cal. Aug. 1, 2008) (internal citations and quotations omitted) (denying authorization for 17(c) subpoena for information regarding two telephone numbers over a seven-month period because it was "vague and unspecific"); *see also United States v. Stukenbrock*, No. 5:15-cr-00034-EJD-1 (HRL), 2016 U.S. Dist. LEXIS 171563, *6 (N.D. Cal. Dec. 9, 2016) (quashing subpoena even with a narrowed date range, because "it appears that he seeks very broad information about [] bank accounts merely with the hope of finding something helpful").

Courts are particularly wary of requests for "any" or "all" documents of a certain type or category. As this Court observed:

> A demand for any and all documents relating to several categories of subject matter rather than specific evidentiary items, suggests the subpoena's proponent seeks to obtain information helpful to the defense by examining large quantities of documents, rather than to use Rule 17 for its intended purpose—to secure the production for a court proceeding of specific admissible evidence.

Reyes, 239 F.R.D. at 606 (internal quotations omitted); *see also Pac. Gas & Elec. Co.*, 2016 U.S. Dist. LEXIS 40587, at *16 (quashing requests for "complete personnel files" of named employees, "all payments to" those employees, and "all records and communications" regarding the retention of counsel for those employees); *United States v. Phoenix*, No. 5:14-cr-00318-LHK, 2015 U.S. Dist. LEXIS 141373, *7 (N.D. Cal. Oct. 15, 2015) (quashing subpoena where requests did not identify "particular documents from particular custodians," but rather recited "broad categories of documents"); *Aguilar*, 2008 U.S. Dist. LEXIS 63114, at *18 ("Courts will generally find the use of broad requests, such as for 'all files' or 'all records' pertaining to a given subject,

not sufficiently specific."); *Laub*, No. CV 17-6210-JAK (KSX), 2020 WL 7978227, at *8 (ruling it "patently disproportional" to mandate production of "all" of a type of document based on the possibility that one of that type of document was relevant).

Here, the Lynch Subpoena demands "*[a]ll* records and communications between October 1, 2011 and January 31, 2014"—a period of two years and four months—concerning the bases for the ASL Restatement, to or from Yelland or Anderson or generated or received by HP, its affiliates, and its advisors or consultants. This is an expansive request that encompasses hundreds of thousands of emails, letters, chat logs, SMS/text messages, voicemails, phone logs, notes, reports, memoranda, agreements, and other records from hundreds of custodians. As evidenced by a comment made by Lynch's counsel at the meet-and-confer that "we don't know what we don't have," Resley Decl. ¶ 4, Lynch is improperly "casting a wide net with the goal of reeling in something to support it." *United States v. Reyes*, 239 F.R.D. 591, 606 (N.D. Cal. 2006). This is the quintessential "fishing expedition" that courts repeatedly have quashed. For instance, in *Reyes*, the court quashed a subpoena that demanded "any and all information related to stock options issued between 1994 and 1999 by a multi-million dollar company," holding it to be an abuse of Rule 17(c). *Id.* at 605–06. By contrast, the court in *United States v. MacKey* upheld a district court's order to compel production because the defendant "[s]pecifically sought . . . a Brooks Brothers diary and a desk-type calendar." 647 F.2d 898, 899 (9th Cir. 1981).

Here, similar to *Reyes*, Lynch is demanding voluminous materials in the hope that he may find some relevant pieces of information. Such a fishing expedition is not the proper basis of a proper Rule 17(c) subpoena. Accordingly, the Court should quash the Lynch Subpoena for this reason alone.

3. Lynch Seeks Documents That Are Not Relevant

A proponent of a Rule 17(c) subpoena may only request documents that have a "sufficient likelihood" of being "relevant to the offenses charged in the indictment." *Nixon*, 418 U.S. at 700. "In assessing relevance, the court must determine whether the requested material has any tendency to make a fact more or less probable than it would be without the evidence and *whether that fact is of consequence in determining the action.*" *United States v. Stukenbrock*, No. 5:15-cr-

00034-EJD-1 (HRL), 2016 U.S. Dist. LEXIS 171563, *4 (N.D. Cal. Dec. 9, 2016) (internal quotations omitted) (emphasis added). It is not enough that the information sought has "some potential for relevance." *United States v. Roque*, No. CR 13-829 PA, 2014 U.S. Dist. LEXIS 197123, at *5 (C.D. Cal. Aug. 18, 2014).

Here, Lynch requests records "pertaining to materials far beyond the scope of the Indictment," which is improper. *United States v. Salvagno*, 267 F. Supp. 2d 249, 253–54 (N.D.N.Y 2003). Each charge against Lynch relates to fraudulent activity prior to October 2011—*before* HP commenced its internal investigation and began restating the transactions at issue in the ASL Restatement. As such, the requested documents are not relevant to the charges in the indictment. *See United States v. Burke*, No. S-05-0365 FCD, 2009 U.S. Dist. LEXIS 90287, at *8 (E.D. Cal. Sept. 16, 2009) (denying request for issuance of Rule 17 subpoena where, among other concerns, "the time period requested for records far exceeds the relevant time period in the indictment"); *United States v. Mason*, No. CR 05-324-RE, 2008 U.S. Dist. LEXIS 34537, at *5 (D. Or. Apr. 25, 2008) (quashing subpoena for documents that pre-dated or post-dated the FBI's investigation of the defendant); *Salvagno*, 267 F. Supp. 2d, 253–54.

Furthermore, the materials sought are not relevant to a "fact of consequence" in this case. *See Pac. Gas & Elec. Co.*, 2016 U.S. Dist. LEXIS 40587, at *19 (quashing subpoena request where proponent did not make showing that documents sought would be relevant the case). Specifically with respect to Anderson's and Yelland's communications, the information contained therein cannot be relevant because this Court already has ruled that Anderson may not testify to the ASL Restatement and Yelland may testify only as a lay witness and solely to lay a foundation for the document—i.e., ***not*** a fact of consequence in this matter. Tr. 13:18–23 (Feb. 28, 2024). Accordingly, Lynch fails the third and final *Nixon* factor, and the Court should quash the Lynch Subpoena for this reason alone.

C. The Court Should Quash the Lynch Subpoena on Additional Grounds

Even if Lynch could satisfy all three *Nixon* factors—which he cannot—the Court should quash the Lynch Subpoena because it (1) seeks material protected by the attorney-client privilege and attorney work product doctrine; (2) demands statements of prospective witnesses in

prohibition of Rule 17; and (3) is unduly burdensome and oppressive.

1. Lynch Improperly Seeks Privileged Information

As this Court has ruled, "a Rule 17(c) subpoena should be quashed or modified if it calls for a privileged matter," whether under the attorney-client privilege or the attorney work-product doctrine. *Reyes*, 239 F.R.D. at 598 (internal quotations omitted). Nevertheless, all of Lynch's requests demand privileged information. In fact, the Lynch Subpoena expressly demands "unredacted versions of all responsive documents," including documents that were previously produced in redacted form or withheld on the basis of attorney-client, attorney work product, or other protection.

a. The Lynch Subpoena Seeks Materials Subject to the Attorney-Client Privilege

A recipient may seek to quash a Rule 17(c) subpoena on the grounds that it seeks material protected by the attorney-client privilege. *United States v. Tomison*, 969 F. Supp. 587, 597 (E.D. Cal. 1997) (citing *In re Grand Jury Subpoena*, 31 F.3d 826 (9th Cir. 1994)). This extends not only to requests for "communications made in confidence by a client to an attorney for the purpose of seeking professional legal advice," *Reyes*, 239 F.R.D. at 598, but also to communications with third parties that were engaged to assist counsel in providing legal advice. *See Todd v. STAAR Surgical Co.*, No. CV-14-05263 MWF (RZX), 2015 WL 13388227, at *5 (C.D. Cal. Aug. 21, 2015) ("[It is] well-established that the attorney-client privilege may extend to communications with a third party where that third party has been retained as an agent for the purposes of assisting a lawyer in providing legal advice to a client."). A privilege-holder does not waive the attorney-client privilege if he inadvertently produces a "small number" of privileged documents in the course of producing millions of documents. *See Transamerica Computer Co., Inc. v. Int'l Bus. Machs.* Corp., 573 F.2d 646 (9th Cir. 1978).

Here, Lynch demands communications between HP personnel and HP's in-house legal department and outside counsel, Morgan Lewis, as well as confidential communications between HP and PwC, which Morgan Lewis retained to assist in advising HP. He also demands unredacted versions of previously produced materials that had been redacted or withheld on privilege

grounds.

As Lynch's counsel revealed on February 21, 2024, and again at the meet-and-confer with HP counsel on March 11, 2024, the Lynch Subpoena is based solely on assumptions made from a *single* document that EY produced pursuant to an MLAT request, which contains privileged communications from Morgan Lewis and PwC concerning interviews they conducted. Tr. 17:9–18:11 (Feb. 21, 2024). Lynch asserts that the Morgan Lewis and PwC communications, which were "cut and paste[d]" by Yelland's colleague into a memorandum and sent to EY, Tr. 18:6–9 (Feb. 21, 2024), constitute a wholesale waiver. Lynch is wrong. To the extent that a privilege-holder inadvertently produces a small number of privileged documents—in the course of producing millions of documents—that does not effect a blanket waiver. *See Transamerica Computer Co., Inc. v. Int'l Bus. Machs.* Corp., 573 F.2d 646 (9th Cir.1978).

In *Transamerica,* the Ninth Circuit held that IBM, by virtue of its inadvertent production of certain documents in a prior unrelated lawsuit in which it was also a party, did not waive its right to claim in the pending case that those documents were privileged and therefore not discoverable by the plaintiff. *Id.* The Court further explained that IBM's inadvertent production of a limited number of privileged documents, under the extraordinary circumstances of the accelerated discovery proceedings in the prior case, was effectively "compelled." *Id.* at 647, 651. The court noted that, given that IBM had produced millions of documents to the other side, it was statistically inevitable that, despite the extraordinary precautions that IBM employed, some privileged documents would escape detection by the IBM reviewers. *Id.* HP, similar to IBM, has produced millions of documents to the opposing side in connection with the Hussain Trial and the present trial. The inadvertent production of a *single* document containing privileged communications should not and, under governing case law, does not constitute wholesale waiver. *See also United States v. Gangi*, 1 F. Supp.2d 256, 266 (S.D.N.Y.1998) ("Where numerous documents are involved and thousands of pages are produced, errors are more understandable."); *In re Wyoming Tight Sands Antitrust Cases*, 1987 WL 93812, at *5 (D. Kan. 1987) (175 F.R.D. at 578 ("Common sense suggests that a party might inadvertently fail to keep within its grasp one or

two documents in the course of producing 1,500,000.").[5]

Likewise, Lynch's demand for unredacted versions of materials that were previously produced in redacted form or withheld due to privilege is similarly unfounded. If a redacted document is protected by attorney-client privilege, there is no basis to compel production of an unredacted version. *See Santella v. Grizzly Indus., Inc.*, 286 F.R.D. 478, 484 (D. Or. 2012).

Lynch is not entitled to privileged materials and the unintentional production of one document does not change that fact. Accordingly, the Court should quash the Lynch Subpoena to the extent it requests materials protected by the attorney-client privilege.

b. The Lynch Subpoena Seeks Attorney Work Product

The attorney work-product doctrine "protects from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004) (internal citations omitted). This includes "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). It also extends to documents created by a consultant working for an attorney. *In re Grand Jury Subpoena*, 357 F.3d at 907. It is immaterial whether or when litigation begins; if a document was prepared or obtained "because of the prospect of litigation," then the attorney's work product is protected from disclosure. *Id.* at 906–10.

Here, the Lynch Subpoena requests documents generated by HP, its affiliates, its advisors, and its consultants that explain the bases for restating each of the transactions at issue in the ASL Restatement. These documents were created by, or at the request or direction of, HP's legal advisors in anticipation of litigation with Lynch and others and, therefore, are attorney work product to which Lynch is not entitled. Lynch's demand for unredacted versions of materials previously produced with redactions or withheld as attorney work product is similarly unfounded.

[5] Indeed, in the Hussain Trial, this Court prevented admission of—and struck from the record references to—an arguably privileged document that HP had inadvertently produced—and which defense counsel attempted to admit—because it contained legal advice. Hussain Trial Tr. 5201:12–5207:5 (Apr. 17, 2018). The Court held that its inadvertent production did not constitute waiver. *Id* at 5205:19.

See Goff v. Harrah's Operating Co., 240 F.R.D. 659, 660–61 (D. Nev. 2007) (holding that redacted portions of previously produced documents, which contained litigation strategy plaintiff prepared as he was "shopping" his case to attorneys, were protected by work product privilege).

Accordingly, the Court should quash the Lynch Subpoena's requests for documents protected by the work-product privilege.

2. Lynch Improperly Seeks Witness Statements

Rule 17 explicitly states that "[n]o party may subpoena a statement of a witness or of a prospective witness. . . ." Fed. R. Crim. P. 17(h); *see also United States v. Johnson*, No. 14-cr-00412-THE, at *4 (N.D. Cal. Nov. 13, 2014) ("Rule 17(c) subpoenas may not be used to obtain the statement of a witness or of a prospective witness before they have testified, also known as Jencks Act materials.") (internal quotations omitted). Nevertheless, Lynch demands that HP produce evidence of statements witnesses made in interviews conducted as part of HP's internal investigation. This is an improper use of a Rule 17(c) subpoena and another basis for the Court to quash the Lynch Subpoena.

3. Lynch Seeks to Impose an Unreasonable and Oppressive Burden on Non-Party Victims

"[T]he court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). This is clearly applicable here, where HP has produced millions of documents—including nearly 16,000 pages supporting Yelland's summary charts and the ASL Restatement—to the Government, which has produced them to Lynch. Resley Decl. ¶ 3. Lynch's demands would require hundreds if not thousands of hours of work at substantial cost to HP. Restating a company's previous financial statements is an enormous undertaking, especially when there are significant accounting irregularities. Indeed, it took HP over two years to complete the ASL Restatement. Lynch's broad, non-specific requests would require HP to identify, contact, and interview scores of potential document custodians to determine whether they have responsive documents. Potentially responsive documents, which could amount to millions of pages, would need to be collected from individual computers and other sources; reviewed for responsiveness and privilege, and/or other confidentiality issues that may protect the materials from disclosure;

redacted to protect confidential or privileged information; and then processed for production in an appropriate format. It would be virtually impossible for HP to compile a response to the Lynch Subpoena during an ongoing trial and would cost HP hundreds of thousands of dollars.

That is, without question, unreasonable and burdensome. *Phoenix*, 2015 U.S. Dist. LEXIS 141373, at *8-9 (holding that the burden on a third party recipient of a Rule 17 subpoena would be "undue, especially in the short period of time provided where recipient would need to review 190,000 emails and other materials, which "would require hundreds of hours and substantial costs"); *see also Rodriguez*, 2016 WL 6440323, at *2 (quashing subpoena as unreasonable and oppressive where, *inter alia*, "[c]omplying with the subpoena would require the movant to review terabytes of electronic data, a lengthy and extremely costly process"). The law is well settled: the burden that Lynch seeks to place on HP is impermissible. Accordingly, the Court should quash the Lynch Subpoena for this reason alone.

IV. CONCLUSION

For the foregoing reasons, HP respectfully requests that the Court quash the Lynch Subpoena in its entirety. In the event that the Court orders HP to produce certain categories of documents, HP respectfully requests that the Court grant a protective order to designate the documents as protected materials.

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Respectfully submitted,

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